Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Case No. 79-47

DONALD T. EMERY,

Petitioner,

—v.—

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

Case No. _____

DONALD T. EMERY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner Donald T. Emery prays that a writ of certiorari issue to review the judgment of the Ohio Supreme Court dismissing petitioner's appeal for want of substantial constitutional question. The dismissal of petitioner's appeal by the Ohio Supreme Court thereby affirmed the judgment of the Ohio Court of Appeals - Eighth District, which had affirmed petitioner's convictions on two counts of trafficking in drugs.

OPINIONS BELOW

The judgments of the Ohio Supreme Court dismissing petitioner's appeal and denying rehearing are unreported and are set forth respectively, in the Appendix at 19 and 18 .

The judgment and opinion of the Ohio Court of Appeals - Ninth Appellate District, is unreported and is set forth in the Appendix at 20-32. The journal entries of the Court of Common Pleas of Wayne County, Ohio, the trial court, are set forth in the Appendix at 33-36.

JURISDICTION

The judgment of the Ohio Supreme Court dismissing petitioner's appeal as of right was announced on January 17,1979, Appendix at 19.Petitioner's motion for rehearing was denied by the Ohio Supreme Court on March 2, 1979, Appendix at 18. On May 21, 1979, Mr. Justice Stewart, upon application by petitioner, granted an order extending the time within which to file a petition for a writ of certiorari to and including July 10, 1979, Appendix at 17.

This petition seeks review of a final judgment rendered by the Ohio Supreme Court, the highest court in the State of Ohio in which a decision in this case could be had. This Court has jurisdiction pursuant to 28 U.S.C. §1257 (3) because rights, priviledges, and immunities under the Constitution of the Unites States are claimed to have been violated.

QUESTION PRESENTED FOR REVIEW

Where, in a state criminal prosecution for drug trafficking, the defendant alleges that he was entrapped into committing the offense and testimony from prosecution and defense witnesses demonstrates that law enforcement officers instigated and induced the criminal violation, does a jury instruction by the trial court that proof of predisposition by credible evidence will

negate entrapment thereby violate defendant's due process rights under the Fourteenth Amendment to the United States Constitution by relieving the prosecution of the burden of proving all of the facts constituting the elements of the offense beyond a reasonable doubt?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the pertinent portion of the Fourteenth Amendment to the United States Constitution is set forth in the Appendix at 39. The text of Ohio Revised Code §2925.03 is set forth in the Appendix at 40-46.

STATEMENT OF THE CASE

Petitioner Donald T. Emery was convicted on February 18, 1978, of two counts of Trafficking in Drugs by a jury in the Common Pleas Court of Wayne County, Ohio. Petitioner was sentenced by the trial court to a concurrent sentence of two (2) to ten (10) years inprisonment for each conviction. The judgment and sentence of the trial court were affirmed by the Ohio Court of Appeals - Ninth Appellate District. Petitioner's appeal to the Ohio Supreme Court subsequently was dismissed for want of substantial constitutional question and rehearing was denied.

At trial, charged with the sale of approximately twenty-three (23) grams of marijuana resin concentrate (T.108).[1/]

1/ All references to the transcript of the proceedings in the trial court will be referred to by the letter "T", followed by the page number(s).

and approximately seven (7) grams of a powder containing cocaine (T.129), petitioner Emery introduced evidence, on cross examination of prosecution witnesses and through direct examination of defense witnesses, that he had an unblemished reputation and had been entrapped by state drug enforcement agents (See, e.g.T.59 - 91, 97 - 100, 152 - 164, 179 - 190, 195 - 197, 208 - 234, 243 - 250). Petitioner's evidence showed that after repeated, persistent entreaties by the drug agent Smith, petitioner relented and agreed to obtain the drugs "to get this man off my back" (T.250).

At the close of evidence, the trial court instructed the jury on the law (T. 304 - 316) including the elements of the crimes and the concept of entrapment. For each violation, the trial court instructed that the jury had to find beyond a reasonable doubt that "the defendant knowingly sold . . . " the specific controlled substances (T.307,308). The court also included an instruction on "purpose" (T.312). The trial court began its instruction on entrapment by stating that:

> "The defendant denies that he formed a purpose to commit a crime. He claims that he is excused because he was unlawfully entrapped by the undercover agent." (T.310)

In its explanation of the meaning of entrapment, the trial court noted that:

> "A person is not entrapped when officers, for the purpose of detecting crime, merely present a defendant with the opportunity to commit an offense."

However, the trial court concluded its

remarks on entrapment by instructing that:

> "If you find by credible evidence that the defendant had the predisposition and criminal design to commit the acts into which he claims he was entrapped, and that he was merely provided with an opportunity to commit those acts for which he was both apt and willing, then he has not been unlawfully entrapped (T.311) (emphasis added).

Petitioner's objections to the trial court's entrapment-burden of proof instructions were entered prior to the reading of the instructions to the jury (T.265) and were later renewed (T.316). On appeal to the Ohio Court of Appeals - Ninth Appellate District, petitioner assigned as error the trial court's instruction relieving the prosecution of the burden of proving predisposition beyond a reasonable doubt (Appendix at 38). Petitioner specifically argued in his brief before the court of appeals concerning that assignment of error (Brief at 11) that "the reasonable doubt standard of proof has constitutional stature. In re Winship, 297 U.S. 358 (1970)."

On appeal to the Ohio Supreme Court, petitioner again assigned as error in the propositions of law submitted to the court the instruction on the burden of proving predisposition (Appendix at 37). In the jurisdicitonal memorandum submitted to the Ohio Supreme Court, petitioner reiterated that "'the reasonable doubt' standard of proof has constitutional stature. In re Winship, 297 U.S. 358 (1970)" (Memorandum at 7). However, the Ohio Supreme Court, without opinion, dismissed petitioner's appeal for want of substantial constitutional question (Appendix at 19) and later denied, without opinion, petitioner's application for rehearing (Appendix at 18).

REASONS FOR GRANTING WRIT

AN IMPORTANT QUESTION IS PRESENTED FOR REVIEW CONCERNING THE APPLICATION OF THE DUE PROCESS PRINCIPLES ENUNCIATED IN IN RE WINSHIP, 397 U.S. 358 (1970) AND MULLANEY V. WILBUR, 421 U.S. 684 (1975) TO A STATE CRIMINAL PROSECUTION WHERE ENTRAPMENT IS ALLEGED BUT THE JURY IS INSTRUCTED THAT PROOF BY "CREDIBLE EVIDENCE" OF PREDISPOSITION WILL NEGATE THE QUESTION OF ENTRAPMENT.

This Court should grant a writ of certiorari in the instant case to resolve the confusion and uncertainty which presently exists among state and federal courts concerning the application of the due process requirement of proof beyond a reasonable doubt in criminal proceedings.

The Court, in the case of In Re Winship, 397 U.S. 358 (1970), involving the review of a state juvenile proceeding, firmly announced that,

> "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id., at 365.

In the subsequent cases of Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, 432 U.S. 197 (1977), which involved state criminal proceedings, this Court adhered to the principal enunciated in Winship, supra. Accord, Sandstrom v. Montana, ___ U.S. ___, 47 U.S.L.W. 4719 (June 19, 1979, No. 78-5384).

However, in Patterson v. New York, supra, the Court held that the New York murder law did not place an unconstitutional burden of proof upon the defendant by requiring the defendant to prove the affirmative defense of extreme emotional disturbance, as defined by New York law. The basis for the Court's holding was the specific language of the New York statute which defined murder only "as causing the death of another person with intent to do so." 432 U.S. at 205.

Mullaney v. Wilbur, supra, was narrowly distinguished by the Court in Patterson on the basis that, in Mullaney, the Maine murder law included malice aforethought as an element of the crime of murder and, under Maine law, malice aforethought was considered inconsistent with the heat of passion on sudden provocation; if one were proved, the other would be negated. 432 U.S. at 213, 215-216. In Mullaney, pursuant to Maine law, malice was presumed and the burden of proof was shifted to the defendant to negate that element by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation.

The Court in Patterson found the presumption of malice and its connection, under Maine law, with the absence of heat

of passion to be the controlling distinction between the Maine and New York law. Because the New York statute did not employ the common law language of malice but required only proof of facts of "the death, the intent to kill and causation", 432 U.S. at 205, the Court reasoned that proof of the New York affirmative defense of extreme emotional disturbance was a separate issue from the facts constituting the New York crime of murder. 432 U.S. at 207. Despite the Court's analysis in Patterson, the Maine and New York law were so close and the distinctions drawn were so fine that the dissent in Patterson commented:

> "The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's." 432 U.S. at 221.

As a result of the Patterson decision, trial courts are faced with a test which appears based on largely narrow semantic distinctions. Consequently, the trial and appellate courts are left without guidance on a point which arises in virtually every criminal proceeding.[2/] State courts are confronted with defendants who argue that jury instructions incorrectly place the burden of proof on certain issues on the defendant, or improperly lessen the quantum

[2/] For examples of the ambiguity and conflict which result from the Patterson test, see, e.g., United States v. Jackson, 487 F. 2d 852 (6th Cir. 1978); Berrier v. Egeler, 583 F. 2d 515 (6th Cir. 1978); Wright v. Smith, 569 F. 2d 1188 (2nd Cir. 1978); Grace v. Hopper, 566 F. 2d 507 (5th Cir. 1978).

of proof on particular issues the prosecution must prove. Prosecutors may just as likely object to jury instructions which unduly increase the burden on the prosecution or unfairly lessen a defendant's burden of production or burden of proof as to an affirmative defense. Thus, it is to this Court that the judiciary looks for guidance in an area of compelling importance and immediacy.

The instant case presents an ideal vehicle for the Court to clarify the rule, announced in Winship, Mullaney and Patterson and to provide the sorely needed guidance to the courts below. In this case, petitioner alleged that he was entrapped into committing the charged offenses. At issue, here, is the trial court's instruction which petitioner asserts unconstitutionally relieved the prosecution from proving all the essential facts of the crimes charged and effectively shifted the burden to the petitioner to prove the absence of criminal purpose.

In the instant case, after the trial court explained to the jury that "[t]he defendant denies that he formed a purpose to commit a crime" (T. 310), the court then instructed the jury on the theory and elements of entrapment (T. 311). In concluding, the trial court instructed that:

> "If you find by credible evidence that the defendant had criminal design to commit the acts into which he claims he was entrapped, and that he was merely provided with an opportunity to commit those acts

for which he was both apt and willing, then he has not been unlawfully entrapped." (T. 311) (Emphasis added).

The "credible evidence" instruction certainly resulted in a reduction of the prosecution's burden of proving, beyond a reasonable doubt, every fact necessary to constitute the crimes with which the petitioner was charged. Indeed, "credible evidence" connotes a quantum of proof well below preponderance of the evidence.

Furthermore, the prejudice caused by the "credible evidence" instruction was further exacerbated by the trial court's instruction on the element "knowingly" which commenced: "A person acts knowingly, regardless of his purpose..." (T. 308) (emphasis added) and which clearly contradicted the court's later explanation that "entrapment is a denial of general criminal purpose...." (T. 311). The court also included an instruction on "purpose" which seemingly negated the entire defense of entrapment: "Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result of engaging in specific conduct."[3] (T. 312). Thus, the trial court's "credible evidence" instruction, even when viewed

[3] Petitioner specifically objected to the conflict between the "purpose" instruction and the entrapment instruction. (T. 265, 316).

with the jury instructions as a whole, would have caused a reasonable juror to assume that the prosecution was not required to prove predisposition beyond a reasonable doubt.[4]

Ohio law recognizes entrapment as a defense under the rationale first advanced by this Court in Sorrells v. United States, 287 U.S. 435 (1932) and repeated in subsequent decisions of this Court.[5]

> "Thus, the thrust of the entrapment defense was held to focus on the intent or predisposition of the defendant to commit the crime." United States v. Russell, 411 U.S. 423, 429 (1973).

Similarly, Ohio courts have held that:

> "Relevant to the issue [of entrapment] is the predisposition and willingness of the accused to commit the crime and the criminal design of the accused.

[4] Cf. Sandstrom v. Montana, supra, ___ U.S. ___, 47 U.S.L.W. 4719; Cool v. United States, 409 U.S. 100 (1972).

[5] See, Sherman v. United States, 356 U.S. 369 (1958); United States v. Russell, 411 U.S. 423 (1973); Hampton v. United States, 425 U.S. 484 (1976).

"The rule has been stated that there is no entrapment where criminal intent originates in the mind of the accused and authorities merely afford opportunities or facilities for commission of the offense." State v. Dutton Drugs, Inc., 3 Ohio App. 2d 118, 121, 209 N.E. 2d 597, 599 (Meigs Cty. 1965)(Citations omitted).

Entrapment under Ohio law, consistent with the emphasis placed on the intent or predisposition of the accused to commit the crime, is not considered an affirmative defense but, rather, represents a denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged. State v. Poole, 33 Ohio St. 2d 18, 294 N.E. 2d 888 (1973). The Ohio Supreme Court has distinguished the concept of entrapment, as well as alibi and accident, from affirmative defenses such as insanity and self-defense on the basis that the former are not "justifications for admitted conduct." See, State v. Robinson, 47 Ohio St. 2d 103, 108, 351 N.E. 2d 88, 92 (1976); State v. Poole, supra, 33 Ohio St. 2d 18, 294 N.E. 2d 888. 6/

6/ Ohio courts' interpretation of entrapment arguably places this case within the ambit of In re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684 (1975) and removes it from the "exception" established under Patterson v. New York, 432 U.S. 197 (1977). Cf. Berrier v. Egeler, 583 F. 2d 515 (6th Cir. 1978), cert. denied, ___U.S.___, 99 S.Ct. 354 (1978).

At trial, petitioner's evidence of his unblemished reputation in the community (see e.g., T. 179-184, 198-202) and the persistent entreaties by the drug enforcement agent to the petitioner to obtain drugs for the agent, (see, e.g., T. 59-91, 184-198, 208-234), clearly raised an issue of entrapment under Ohio law. The record discloses that the jury was deeply concerned by the entrapment issue and posed questions to the trial court concerning the defense. In fact, the jury's request for facts concerning the agent's telephone calls to the petitioner and whether the petitioner received any money from the drug transactions (T. 317) amply demonstrates how crucial the trial court's instructions were in determining the burden of proof and the ultimate question of petitioner's guilt or innocence. Petitioner's evidence supported a conclusion that, under Ohio law, he had had no criminal purpose but rather had been entrapped.

Moreover, the Ohio courts' interpretation of the entrapment defense and its negating effect upon the element of intent or purpose is consistent with this Court's interpretation of the entrapment defense. This Court, in Sorrells v. United States, 287 U.S. 435 (1932), Sherman v. United States, 356 U.S. 369 (1958), United States v. Russell, 411 U.S. 423 (1971) and Hampton v. United States, 425 U.S. 484 (1976), has repeatedly emphasized that the entrapment defense is based upon a statutory construction of the criminal statutes. In Sherman v. United States, supra, 356 U.S. at 372, the Court stated that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." The Court has

continued "to focus on the intent or predisposition of the defendant to commit the crime." United States v. Russell, supra, 411 U.S. at 429. Entrapment is established only by the negation, or absence, of the predisposition of the defendant to commit the crime. See, Hampton v. United States, supra, 425 U.S. at 488-489.

The importance of the defense of entrapment to an orderly and fair system of criminal justice cannot be questioned. However, a defendant might well be completely foreclosed from vindicating his innocence by the improper shifting, or lowering of the burden of proof. Such a result, because of the very nature of the defense of entrapment - to protect the unwary innocent from conviction for crimes manufactured by government officials - would not only unjustly deprive an innocent of his liberty but would undermine the criminal justice system.

Thus, even if Ohio law did not recognize entrapment as a device negating or denying the essential elements of the crime, this Court's view of entrapment would compel review in this case pursuant to the admonition in Patterson v. New York, supra, 432 U.S. at 210, that although state legislatures may be permitted "to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes," "...there are obviously constitutional limits beyond which the States may not go in this regard."

CONCLUSION

The Court in In re Winship, supra, recognized society's interests in the reliability of jury verdicts in criminal cases:

> "The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by conviction....As we said in Speiser v. Randall,
>
> > 'There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value--as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that

> no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt.'
>
> "To this end, the reasonable-doubt standard is indispensable...." 397 U.S. at 363-364 (citations omitted).

In this case, petitioner's convictions were achieved only by unconstitutionally diluting the reasonable-doubt standard on a fact necessary to constitute the crimes with which he was charged. Furthermore, it cannot be said that the unjust result in the instant case was an isolated aberration. Trial and appellate courts are presently in dire need of the clarification and guidance which can be supplied only by this Court on a question of pressing importance to the system of criminal justice.

Therefore, petitioner respectfully urges this Court, for all the foregoing reasons, to grant a writ of certiorari.

Respectfully submitted,

BERNARD A. BERKMAN
Attorney for Petitioner

APPENDIX

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-1009

DONALD T. EMERY,

Petitioner,

v.

OHIO

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 10, 1979.

/S/_____
Potter Stewart
Associate Justice of
the Supreme Court of
the United States

Dated this 21st
day of May, 1979.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
City of Columbus) 1979 Term

To-wit: March 2, 1979

The State of Ohio,)
Appellee,)
)
vs.) No. 78-1265
)
Donald T. Emery,) REHEARING
Appellant.)

It is ordered by the court that rehearing in this case is denied.

I, THOMAS J. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copies from the records of said Court, to wit, from Journal No.___ Page ____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 2nd day of March, 1979.

THOMAS L. STARTZMAN Clerk

By /S/_____ Deputy
Sam F. Adkins

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1979 Term
City of Columbus)

To wit: January 17, 1979

State of Ohio,)
Appellee,) No. 78-1265
)
vs.) APPEAL FROM THE
) COURT OF APPEALS
Donald T. Emery,)
Appellant.) for Wayne County

This cause, here on appeal as of right from the Court of Appeals for Wayne County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Wayne County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 2nd day of March, 1979

Thomas L. Startzman, Clerk

/S/_____, Deputy
Sam F. Adkins

STATE OF OHIO)		IN THE COURT OF
)	SS:	APPEALS, NINTH
WAYNE COUNTY)		JUDICIAL DISTRICT

STATE OF OHIO	)	C.A. No. 1553
Plaintiff-Appellee	)	
	)	APPEAL FROM JUDGMENT
v.	)	ENTERED IN THE COURT
	)	OF COMMON PLEAS OF
DONALD T. EMERY	)	WAYNE COUNTY, OHIO
Defendant-Appellant	)	CASE NO. 77 CR 131
	)	and 77 CR 157

DECISION AND JOURNAL ENTRY

Dated: August 23, 1978

This cause was heard May 26, 1978, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

PER CURIAM

Defendant-appellant, Donald T. Emery, appeals his jury convictions for trafficking in marijuana in an amount equal to or exceeding three times the bulk amount in violation of R.C. 2925.03(A)(7); and for trafficking in drugs in an amount not exceeding three times the bulk amount in violation of R.C. 2925.03(A)(1). We affirm.

FACTS

The defendant's arrest was the result of undercover work performed by David B. Smith, a "Medway" enforcement group agent. The defendant claimed he was entrapped by Smith.

ASSIGNMENT OF ERROR I

"The judgment is against the weight of the evidence."

The defendant says that there is no probative evidence whether the substance involved in case no. 77-CR-131 is a resin preparation, for which the bulk amount is ten grams, R.C. 2925.01(E)(3), or a resin concentrate, for which the bulk amount is two grams under the same statute. The defendant was indicted for the knowing sale of marijuana resin preparation in an amount equal to or exceeding three times the bulk amount as defined in R.C. 2925.01 in violation of R.C. 2925.03(A)(7). R.C. 2925.01(E)(3) defines the bulk amount as:

> "An amount equal to or exceeding two hundred grams of marihuana, [sic] or an amount equal to or exceeding ten grams of the resin contained in marihuana, [sic] or of any extraction or preparation of such resin, or equal to or exceeding two grams of such resin in a liquid concentrate, liquid extract, or liquid distillate form;"

The substance sold by the defendant weighs 23.3 grams. The B.C.I. analyst

stated that the substance appeared under visual observation to be a heavy liquid which poured out of its container, although some had to be scraped out of the container. Two chemical analyses were performed on the substance. At various points in the analyst's testimony, the substance was described in the following terms:

> "***a liquid concentrated marijuana resin preparation***,"
>
> "***a liquid concentrate***; a preparation [of a cannobanoid resin]***; a resin preparation and a liquid concentrate***; a resin preparation***a concentrated form***; a very concentrated liquid resin preparation of the plant, marijuana."

Over objection, the court charged the jury that in order to convict, they would have to find beyond a reasonable doubt that

> "***the defendant knowingly sold marijuana resin preparation and that the marijuana resin preparation was in a liquid concentrate, liquid extract or liquid distillate form,***"

Although the testimony is not as clear as it might be, the analyst was consistent in his opinion that the substance is a liquid concentrate, and not mere resin or resin preparation. The defendant argues that there is no scientific basis for this opinion. This assertion is

prompted by the defendant's opinion of the nature and reliability of the tests employed by the analyst, in which opinion the analyst did not concur. We find that the verdict is supported by sufficient evidence.

In State v. McDonald, 32 Ohio App. 2d 231 (1972), we defined the circumstances in which entrapment does or does not occur. We find that there is sufficient evidence to overcome defendant's claim of entrapment.

ASSIGNMENT OF ERROR II

> "The trial court erred in its charge to the jury on entrapment."

The defendant objects to the following portion of the charge:

> "***".
>
> "If you find by credible evidence that the defendant had the predisposition and criminal design to commit the acts into which he claims he was entrapped, and that he was merely provided with an opportunity to commit those acts for which he was both apt and willing, then he has not been unlawfully entrapped.***"

The defendant says that this phraseology permits the state to establish predisposition by the preponderance of the evidence, in violation of the principle that

the state bears the burden of disproving an affirmative defense, including entrapment, beyond a reasonable doubt once the defendant has met his burden of going forward with the evidence. In State v. McNamara, No. 1539 (9th Dist. Ct. App., August 23, 1978), we found that entrapment is an affirmative defense under R.C. 2901.05. We further noted that the state does not bear the burden of disproving that defense beyond a reasonable doubt. State v. Abner, 55 Ohio St. 2d 251 (1978).

The portion of the charge objected to by the defendant is drawn almost word for word from the third syllabus of our decision in State v. McDonald, supra. We adhere to that decision. We believe the defendant has failed to consider the portion of the charge he objects to in the context of the charge as a whole. An examination of the charge as a whole shows that the trial court charged in conformity with the guidelines set forth in State v. Robinson, supra. See, State v. Cook, No. 1548 (9th Dist. Ct. App., August 23, 1978); State v. McNamara, supra. Further, nothing in McDonald, supra, attempts to alter the state's burden of proving an accused's guilt beyond a reasonable doubt.

ASSIGNMENT OF ERROR III

> "The trial court erred in failing to suppress, and is admitting over defendant's objection, evidence secured by means of entrapment."

The defendant presents a novel argument that probable cause is, or should

be, a prerequisite to police participation in entrapping techniques, with an exclusionary rule operating to exclude evidence gathered when no probable cause is present. This scheme would be implemented, the defendant asserts, by prior determinations by impartial magistrates, or by ex post facto determinations at a hearing on a motion to suppress, or at trial. We are not persuaded, however, to launch this experiment.

ASSIGNMENT OF ERROR IV

> "The trial court erred in failing to grant defendant's motion to dismiss at the close of state's evidence and in instructing the jury with respect to whether the substance in Case No. 77-CR-131 was a resin preparation or a resin concentrate."

This question was considered under the first assignment of error.

ASSIGNMENT OF ERROR V

> "The trial court erred in failing to suppress and in admitting over defendant's objection evidence of incriminating statements of defendant."

At issue here is the discoverability or non-discoverability of certain utterances made by the defendant to Smith during course of Smith's undercover work and during the drug transactions. Crim. R. 16(B)(1)(a)(i), (ii) states:

"Disclosure of evidence by the prosecuting attorney. (1) Information subject to disclosure. (a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect***copy or photograph any of the following which are available to, or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney: (i) Relevant written or recorded statements made by the defendant or***or copies thereof; (ii) Written summaries of any oral statement, or copies thereof, made by the defendant or***to a prosecuting attorney or any law enforcement officer;"

The defendant filed a demand for discovery which included a request for materials encompassed by this rule. The prosecution's response indicated that no such materials were in the custody of the prosecutor's office. The defendant thereupon filed a motion for discovery. This motion focused upon the alleged failure of the prosecutor to allow the defendant access to test results or reports prepared by a B.C.I. analyst. At a hearing conducted on defendant's motions for a bill of particulars, suppression, and discovery, the focus of inquiry on the discovery motion expanded to include statements of the defendant. It developed that the undercover agent had

written down conversations between he and the defendant which took place during the course of the investigation and during the crimes. These conversations were recorded as part of the "buy reports" prepared by Smith. The prosecutor took the position that a "statement" for purposes of Crim. R. 16 is a narration, exculpatory or inculpatory, of past events. The court found that the conversations were not discoverable. The court indicated that the reports would be viewed in-camera during the trial for possible use in impeaching the witness. Smith testified during the course of this hearing. A transcript of the hearing was prepared the following day. Trial commenced some two months later.

At trial, Smith testified to conversations he had with the defendant. Defendant's motion to strike, based upon his discovery motion, was overruled. Smith was asked on cross-examination whether he had reviewed his buy reports in preparation for his appearance. Upon Smith's affirmative response, court and counsel retired to chambers for an in-camera inspection of the reports. The proceedings of that inspection were not transcribed. The record does show, however, that defense counsel was in possession of the buy report subsequent to the in-camera inspection. We have not been favored with the buy report(s) as part of the record on appeal. Defense counsel was also possessed of the transcript of the pre-trial hearing. Both items were used during the cross-examination of Smith.

The defendant says that the question at issue is whether the word "statements", as used in Crim. R. 16(B)(1)(a), include utterances made contemporaneous with the offense, as well as those made after the offense. The state asserts that so-called "res gestae" utterances are not encompassed by the term "statements" as used in Crim. R. 16(B)(1)(a).

Prior to the adoption of the Criminal Rules, the question whether the state would be required to provide discovery of the defendant's own statements rested in the sound discretion of the trial court. State v. White, 15 Ohio St. 2d 146, 159 (1968); State v. Corkran, 3 Ohio St. 2d 125 (1965). The language of Crim. R. 16 (B)(1)(a), however, is not qualified by words importing discretion on the trial court's part in deciding whether available statements shall be provided to the defendant. Unless a protective order is issued pursuant to Crim. R. 16(E)(1), they must be provided. See, State v. Hall, 48 Ohio St. 2d 325 (1976); State v. Smith, 50 Ohio App. 2d 183 (1976).

We hold that the term "statements" as used in Crim. R. 16(B)(1)(a) include declarations contemporaneous with an event. In State v. Byars, No. 8543 (9th Dist. Ct. App. December 21, 1977), we found reversible error in the trial court's failure to grant a motion for discovery of summaries of the defendant's own statements and of statements made by co-defendants. We quote from Byars:

> "The summaries in issue are based upon statements made by the defendants to undercover police officers and are contained in confidential reports to supervisory police officials."

This interpretation is consistent with the federal view. See, e.g., United States v. Walker, 538 F. 2d 266, 268 (9th Cir. 1976); United States v. James, 495 F. 2d 434, 436 (5th Cir. 1974), cert. denied 419 U.S. 899 (1974); United States v. Bryant, 439 F. 2d 642, 649-50 (D.C. Cir. 1971); Davis v. United States, 413 F. 2d 1226, 1231 (5th Cir. 1969); United States v. Isa, 413 F. 2d 244, 246-249 (7th Cir. 1969). We agree, however, with the distinction made in United States v. Green, 548 F. 2d 1261, 1267 (6th Cir. 1977). There, the court held undiscoverable "spontaneous, unsolicited admissions, made within hearing of an undercover police officer." These declarations were contrasted with answers by the defendant to direct questions propounded by a government agent.

We find that "statements" of the defendant, or summaries thereof, were available to the prosecutor. It is irrelevant that they were not on tape. See, United States v. Villa, 370 F. Supp. 515, 518-519 (D.C. D. Conn. 1974). We conclude, therefore, that the trial court erred in not ordering the state to produce the statements. We add that it is irrelevant how the reports containing such statements or summaries thereof are denominated. If there is concern that information not subject to disclosure is part of the report, the trial court has full authority to examine the report and order privileged material excised. See United States v. Villa, supra, at 520.

The question remains whether the error is prejudicial. Crim. R. 52(A); See, State v. Cooper, 52 Ohio St. 2d 163, 177 (1977). We conclude that it was not. We do not base this determination upon the mere receipt of the buy report by the defendant during the trial. The possibility of gaining access to statements through the mechanism of Crim. R. 16(B)(1)(g) is no substitute for pre-trial discovery mandated by Crim. R. 16(B)(1)(a). Our determination that no prejudicial error occurred is based upon a comparison between Smith's testimony at the pre-trial hearing and his trial testimony. First, Smith's testimony at trial concerning admissions made by the defendant on October 8, 1977, concerning "seven-fourteens" and defendant's query whether Smith was "interested in marijuana" is not present in the hearing transcript. We find, however, that this testimony relates to "unsolicited admissions made within hearing of an undercover police officer", United States v. Green, supra at 1267, and are not "statements" under Crim. R. 16(B)(1)(a). At trial, Smith testified to two statements of the defendant which are not present in the transcript of the hearing. These concern an alleged telephone conversation between Smith and the defendant on October 21 concerning the time they would meet and defendant's ability to procure a quarter ounce of cocaine and forty pounds of marijuana. The remaining statements of the defendant contained in Smith's trial testimony are substantially present in Smith's testimony at the hearing. We do

not believe the defendant was prejudiced by the trial court's ruling due to the availability to him of the pre-trial hearing transcript. See, State v. Broyles, 559 S.W. 2d 614 (Mo. App. 1977). Further, there was no motion for a continuance made by the defendant during trial. In short, we find that fundamental fairness does not require the granting of a new trial.

SUMMARY

We overrule all assignments of error and affirm the judgment

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Wayne County Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/S/Edward J. Mahoney
Presiding Judge
- for the Court -

MAHONEY, P.J.
VICTOR, J.
HUNSICKER, J.
CONCUR

(Hunsicker, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Article IV, §6(C), Constitution).

APPEARANCES:

ROBERT N. GLUCK, Asst. Prosecuting Attorney, Silver Building, Public Square, Wooster, Ohio 44691 for Plaintiff-Appellee.

ALLEN SCHULMAN, JR., Attorney at Law, Schulman & Figler, 636 Citizens Savings Building, Canton, Ohio 44702 for Defendant-Appellant.

IN THE COMMON PLEAS COURT
OF WAYNE COUNTY, OHIO

STATE OF OHIO, Plaintiff,	)	Case No. 77-CR-131
vs.	)	JOURNAL ENTRY
DONALD T. EMERY, Defendant.	)	

This cause came on for trial on the 16th, 17th and 18th day of February, 1978, to a jury of twelve who were duly empaneled and sworn to well and truly try the issues joined and a true verdict render according to the evidence and the law, the defendant herein having previously entered a plea of "not guilty" to an indictment charging him with Trafficking in Drugs in violation of §2925.03(A)(7) of the Ohio Revised Code. Said defendant was represented by counsel, Attorney Allen Schulman, Jr.

After hearing the evidence, arguments of counsel, and instructions of the Court, the Jury retired to the jury room and after due deliberation returned to the Court room and presented their verdict in proper form in writing finding the defendant "guilty" as charged in the within indictment.

The Court, in coming to pass sentence, asked the defendant if he had anything to say before judgment was pronounced and the defendant being unable to show cause as to why judgment should

not now be pronounced, the Court did thereupon sentence said defendant to the Ohio State Reformatory, Mansfield, Ohio, for an indeterminate term of not less than two (2) years nor more than fifteen (15) years, with six (6) months actual incarceration. Said sentence is to be served concurrently with the sentence imposed in Case No. 77-CR-157.

The Sheriff of Wayne County, Ohio, is hereby ordered and directed to cause said defendant to be conveyed to the Ohio State Reformatory, Mansfield, Ohio, for the serving of said sentences and to make due return to this Court. It is further ordered that said defendant pay the costs of this action taxed at $_____.

/S/_____
Judge of the Common Pleas Court

APPROVED:

/S/_____
Assistant Prosecuting Attorney

IN THE COMMON PLEAS COURT
OF WAYNE COUNTY, OHIO

STATE OF OHIO, Plaintiff,	)	Case No. 77-CR-157
vs.	)	JOURNAL ENTRY
DONALT T. EMERY, Defendant.	)	

This cause came on for trial on the 16th, 17th and 18th day of February, 1978, to a jury of twelve who were duly empaneled and sworn to well and truly try the issues joined and a true verdict render according to the evidence and the law, the defendant herein having previously entered a plea of "not guilty" to an indictment charging him with Trafficking in Drugs in violation of §2925.03(A)(1) of the Ohio Revised Code. Said defendant was represented by counsel, Attorney Allen Schulman, Jr.

After hearing the evidence, arguments of counsel, and instructions of the Court, the Jury retired to the jury room and after due deliberation returned to the Court room and presneted their verdict in proper form in writing finding the defendant "guilty" as charged in the within indictment.

The Court, in coming to pass sentence, asked the defendant if he had anything to say before judgment was pronounced and the defendant being unable to show cause as to why judgment should not now be pronounced, the Court did thereupon

sentence said defendant to the Ohio State Reformatory, Mansfield, Ohio, for an indeterminate term of not less than two (2) years nor more than ten (10) years, said sentence to be served concurrently with the sentence imposed in Case No. 77-CR-131.

The Sheriff of Wayne County, Ohio, is hereby ordered and directed to cause said defendant to be conveyed to the Ohio State Reformatory, Mansfield, Ohio, for the serving of said sentences and to make due return to this Court. It is further ordered that said defendant pay the costs of this action taxed at $_____.

/S/_____
Judge of the Common Pleas Court

APPROVED:

/S/_____
Assistant Prosecuting Attorney

PROPOSITIONS OF LAW PRESENTED IN MEMORANDUM IN SUPPORT OF JURISDICTION TO THE SUPREME COURT OF OHIO

Proposition of Law No. I:

THE TRIAL COURT ERRED IN ITS CHARGE TO THE JURY ON THE DEFENSE OF ENTRAPMENT, BY INSTRUCTING THE JURY THAT THE STATE COULD OVERCOME THE DEFENSE OF ENTRAPMENT BY "CREDIBLE EVIDENCE".

* * *

ASSIGNMENTS OF ERROR TO OHIO COURT OF APPEALS, NINTH APPELLATE DISTRICT

I. The judgment is against the weight of the evidence.

II. The trial court erred in its charge to the jury on entrapment.

III. The trial court erred in failing to suppress, and in admitting over defendant's objection, evidence secured by means of entrapment.

IV. The trial court erred in failing to grant defendant's motion to dismiss at the close of state's evidence and in instructing the jury with respect to whether the substance in Case No. 77-CR-131 was a resin preparation or a resin concentrate.

V. The trial court erred in failing to suppress and in admitting over defendant's objection evidence of incriminating statements of defendant.

CONSTITUTION OF THE UNITED STATES

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE

§2925.03 Trafficking in drugs.

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance in an amount less than the minimum bulk amount as defined in section 2925.01 of the Revised Code;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another;

(3) Cultivate, manufacture, or otherwise engage in any part of the production of a controlled substance;

(4) Possess a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount;

(5) Sell or offer to sell a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount;

(6) Possess a controlled substance in an amount equal to or exceeding three times the bulk amount;

(7) Sell or offer to sell a controlled substance in an amount equal to or exceeding three times the bulk amount;

(8) Provide money or other items of value to another person with the purpose that the recipient of the money or items of value would use them to obtain controlled substances for the purpose of selling or offering to sell such controlled substances in amounts exceeding a bulk amount or for the purpose of violating division (A)(3) of this section.

(B) This section does not apply to manufacturers, practioners, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4729., 4731., and 4741. of the Revised Code.

(C) If the drug involved is any compound, mixture, preparation, or substance included in schedule I with the exception of marihuana or in schedule II, whoever violates this section is guilty of aggravated trafficking.

(1) Where the offender has violated division (A)(1) of this section, aggravated trafficking is a felony of the third degree, and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree.

(2) Where the offender has violated division (A)(2) of this section, aggravated trafficking is a felony of the third degree, and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree.

(3) Where the offender has violated division (A)(3) of this section, aggravated trafficking is a felony of the second degree and the court shall impose

a sentence of actual incarceration of three years and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of five years.

(4) Where the offender has violated division (A)(4) of this section, aggravated trafficking is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years.

(5) Where the offender has violated division (A)(5) or (A)(6) of this section, aggravated trafficking is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the first degree, and the court shall impose a sentence of actual incarceration of five years.

(6) Where the offender has violated division (A)(7) of this section, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of five years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of at least seven years.

(7) Where the offender has violated division (A)(8) of this section, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of seven years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of ten years.

(D) If the drug involved is any compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates this section is guilty of trafficking drugs.

(1) Where the offender has violated division (A)(1) or (A)(2) of this section, trafficking in drugs is a felony of the fourth degree and if the offender has previously been convicted of a drug abuse offense, trafficking in drugs is a felony of the third degree.

(2) Where the offender has violated division (A)(3) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of one year and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of two years.

(3) Where the offender has violated division (A)(4) of this section, trafficking in drugs is a felony of the fourth degree and the court shall impose a sentence of actual incarceration of six months and if the offender has previously been convicted of a felony drug abuse

offense, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months.

(4) Where the offender has violated division (A)(5) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of one year and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of two years.

(5) Where the offender has violated division (A)(6) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years.

(6) Where the offender has violated division (A)(7) of this section, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of two years and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the first degree and the court shall impose a sentence of actual incarceration of four years.

(7) Where the offender has violated division (A)(8) of this section, trafficking in drugs is a felony of the

first degree and the court shall impose a sentence of actual incarceration of five years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of seven years.

(E) If the drug involved is marihuana, whoever violates this section is guilty of trafficking in marihuana.

(1) Where the offender has violated division (A)(1), (A)(2), (A)(3), or (A)(4) of this section, trafficking in marihuana is a felony of the fourth degree and if the offender has previously been convicted of a felony drug abuse offense, trafficking in marihuana is a felony of the third degree.

(2) Where the offender has violated division (A)(5) or (A)(6) of this section, trafficking in marihuana is a felony of the third degree and if the offender has previously been convicted of a felony drug abuse offense, trafficking in marihuana is a felony of the second degree.

(3) Where the offender has violated division (A)(7) of this section, trafficking in marihuana is a felony of the second degree and the court shall impose a sentence of actual incarceration of six months and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of one year.

(4) Where the offender has violated division (A)(8) of this section, trafficking in marihuana is a felony of the second degree and the court shall impose a sentence of actual incarceration of one

year, and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of two years.

(5) If the offense involves a gift of twenty grams or less of marihuana, trafficking in marihuana is a minor misdemeanor for the first offense and a misdemeanor of the third degree for any subsequent offense.

(F) It shall be an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge under this section for possessing a bulk amount of a controlled substance or for cultivating marihuana that the substance which gave rise to the charge is in such amount, in such form, or is prepared, compounded, or mixed with substances which are not controlled substances in such a manner, or is possessed or cultivated in any other circumstances whatsoever as to indicate that the substnace was solely for personal use.

(G) When a person is charged with possessing a bulk amount or a multiple thereof, the jury, or the court trying the accused shall determine the amount of the controlled substance involved at the time of the offense, and if a guilty verdict is returned shall return the findings as part of the verdict. In any such case, it is unnecessary to find and return the exact amount of the controlled substance and it is sufficient if the finding and return is to the effect that the amount of the controlled substance involved is a bulk amount or the requisite multiple thereof, or that the amount of the controlled substance involved is less than a bulk amount or the requisite multiple thereof.

Supreme Court, U. S.
FILED
SEP 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-47

DONALD T. EMERY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

DONALD T. EMERY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

QUESTION PRESENTED FOR REVIEW

Where, a defendant alleges entrapment in defense of a drug charge, does a charge to the jury explaining entrapment elements of the offense to reasonable doubt violate defendant's due process rights under the 14th Amendment.

STATEMENT OF THE CASE

On or about the month of April, 1977, the Medway Drug Enforcement Agency which is operated in Wayne and Medina Counties for the purpose of detecting drug traffic,

placed an agent, one David, aka Bruce, Smith, in Apple Creek State Institute to investigate alleged drug activities occurring either at Apple Creek State Institute or by persons employed there. (Trial Transcript 47, Q.76)

Agent Smith was hired at Apple Creek State Institute as a regular employee. In the course of his contact with others, he would make inquiry into the possibility of obtaining drugs. On one such occassion, the agent was given the defendant's name by one Tom Brothers who had dealth drugs in the past to the agent.

As a result of the lead, the agent phoned the defendant whom he had never seen or met and inquired of drugs. This began on September 19th or thereafter. Several calls were made until October 8, 1977, and the first sale occurred. The number of calls was disputed but the agent claims only five.

The defendant made a trip to see if drugs could be obtained from an acquaintance of his. He was told that same could be obtained and to check back which the defendant did. The second transaction on October 21, 1977, followed the same fact pattern, but with fewer phone calls.

In the first charge, the substance was found to be cocaine, while the second charge dealt with marijuana resin in liquid concentrate form.

The defendant admitted at trial the sales and that the same were done knowingly and illegally, but claimed all were done to get the agent "off his back". The defendant was not threatened by the agent at any time nor enticed by the agent to sell drugs, although the solicitation came from the agent.

The trial lasted three days and after due deliberation, the jury found the defendant guilty on both counts upon which verdict the Court entered judgment accordingly.

REASONS FOR NOT GRANTING WRIT

The matters of shifting burdens of proof to a defendant in a criminal case and the lessening of the burden upon the prosecution in a criminal case has been decided by the United States Supreme Court previously.

The petitioner seeks review based upon a charge to a jury in a criminal case respecting entrapment due to a portion of the charge which he claims shifts the burden upon the defendant to prove entrapment as well as lessening the State's burden of proof to something less than reasonable doubt. It is clear from reading the charge which is appended hereto that no such situation resulted nor was intended.[1]

Indeed, an argument may be made that the culpable mental state under the instant offense in such that a charge on entrapment should not have been given to the jury.[2]

The Ohio Supreme Court has determined that the State does not bear the burden of disproving an affirmative defense.[3] At the conclusion of the charge on entrapment, the Court states:

> "If, after considering all the evidence, including that on the subject of entrapment, you are not convinced beyond a reasonable doubt of the defendant's guilt, you must return a verdict of not guilty."

The significance is that assuming arguendo that the defendant was entitled to an instruction on entrapment, no obligation was placed upon him to prove entrapment which defendant would consider an affirmative defense. See *State v. Robinson*, 47 Ohio State 2d 103. In Ohio, there is a

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[1]Trial Transcript pages 310-312 (hereinafter referred to as T.T. 310-312).

[2]Ohio Revised Code (O.R.C.), §2901.22(B).

[3]*State v. Abner*, 55 Ohio State 2d 251 (1978).

question as to whether or not entrapment is an affirmative defense. See *State v. Dutton Drugs,* 3 O App. 2d 118 (1965) and *State v. Good,* 11 O App. 2d 459.

Additionally, the entrapment defense goes to the culpable mental state of purpose. The charge in this case under Ohio Revised Code §2925.03 requires only that the act be done knowingly which is defined in Ohio Revised Code §2901.22(B) as follows:

> "A person acts knowingly, *regardless of his purpose,* when he is aware that his conduct will probably cause a certain result or will probably be a certain nature. . . (emphasis added)."

The Court charged on purpose with respect to entrapment. Purpose is defined in §2901.22(A) as follows:

> "A person acts purposely when it is his specific intention to cause a certain result . . ."

By definition, therefore, no specific intent is required to be proven under a charge of trafficking. Thusly, it is difficult to see where the defendant was prejudiced by this charge.

The term "predisposition" is used. A rather clear illustration of evidence of "predisposition" as it relates to entrapment was given by Judge Leonard Hand in *United States v. Becker,* 62 R 2d 1007 (2d Cir 1933), wherein he cited three instances demonstrating predisposition to commit a criminal act which are: 1) when defendant has already engaged in similar criminal conduct; 2) where defendant has already formed a design to commit the crime or similar crimes; and 3) where defendant was willing to commit the act as evidenced by ready compliance. It should be noted here that the State objected to the Court's charge on entrapment (T.T. 263).

Finally, the prevailing law in this jurisdiction is that

entrapment is a jury question. The leading United States Supreme Court cases, *Sherman v. United States,* 356 U.S. 369 (1958); *Sorrels v. United States,* 287 U.S. 434 (1932); and *United States v. Russell,* 411 U.S. 423 (1973), stand for the proposition that the test of entrapment is subjective as to origin of intent and predisposition. The "origin of intent" was applied in *State v. McDonald,* 32 O. App. 2d 231 (Ninth District-1972). The Court of Appeals for Meigs County upheld a conviction for narcotics selling even though defendant claimed he was induced to make the sale. *State v. Dutton Drugs,* 3 O. App. 2d 118, 32 O. Ops 2d 204.

In the instant case, the fact pattern, the nature of the relationship of the defendant and agent, and defendant's activities in getting the drugs supply sufficient evidence for the matter to go to the jury. (See T.T. 238, Q. 36 and 37; T.T. 244 and 245, Q. 85 and 86, T.T. 247, Q. 98, 99, 100, 248, 249 and 250.)

The defendant seeks to accord "entrapment: constitutional status. In *United States v. Russell,* 411, U.S. 423 (1973), the Court noted that entrapment is not of constitutional dimension. The rationale for enforcement undercover activity has been stated a number of times. In *Sorrels v. United States,* 287 U.S. 434 (1932), the Court approved "artifice and stratagem" to be employed by law enforcement. It was stated in *State v. Good,* 11 O. Ops. 2d 459, at page 468 as follows:

> ". . . Where only the opportunity to commit a criminal act is afforded the defendant by the conduct of the informer, and the tendencies of the defendant indicate clearly that he intends to disregard injury to the public good and voluntarily accepts the opportunity afforded him to violate the law, particularly where the crime committed is one usually committed in secret and is of

> such a depraved character that the public must be protected, he should, under such facts, stand the consequences of his act. Law enforcement agencies should be allowed to defend society against crimes committed in secret with tools that are equal to the task and through channels that (limited, of course, by the defendant's constitutional rights) will stamp out such destructive conduct which cannot otherwise be properly controlled. The safety of the public is the primary consideration of law enforcement."

See also, *State v. Rowan*, 32 O. App. 2d 142, 61 O. Op. 2d 165; *State v. McDonald*, 32 O. App. 2d 231; *State v. Hsie*, 36 O. App. 2d 99.

In this case, the testimony revealed that Smith (the agent) was given the defendant's name by another person dealing in drugs. Smith merely made phone calls (number of which is disputed) and followed through to finalize the transaction. There is nothing about the agent's behavior which is violative of the defendant's constitutional rights.

CONCLUSION

The precepts set forth in cases advanced by petitioner have not been violated. It is clear that the defendant, in a criminal case, has no burden of proof. Conversely, the State has no burden to disprove specifically the defense advanced by the defendant.

Since this Court has passed upon this matter previously, the writ should be denied.

Respectfully submitted,

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APPENDIX

Ohio Revised Code Section 2901.05

§2901.05 Burden and degree of proof.

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

(D) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

Charge to Jury by Court

THE COURT: Ladies and gentlemen of the jury, you have heard the evidence and the arguments of counsel. It is now the duty of the Court at this time to instruct you in the law that applies to the case.

As you have been told, the Court and jury have separate functions. You decide the disputed facts and the Court provides the instructions of the law. It is your sworn duty to accept these instructions and to apply the law as it is given to you by the Court. You are not permitted to change the law or apply your own conception of what you think the law is or should be.

The criminal case begins with the filing of an indictment. The indictment informs the defendant that he has been charged with a crime. The fact that it has been filed may not be considered by you for any purpose. The plea of Not Guilty is a denial of the charge and puts in issue the essential elements of the crime.

The defendant is presumed innocent until his guilt is established beyond a reasonable doubt. The defendant must be acquitted unless the State produces evidence that convinces you beyond a reasonable doubt of every essential element of the crime charged in the indictment.

Reasonable doubt is present, when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge. Reasonable doubt is doubt based on reason and common sense. This reasonable doubt is not a mere possible doubt because everything connected with human affairs or depending upon moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to

apply it and act upon it in the most important of his own affairs.

If, after full and impartial consideration of all the evidence, you are firmly convinced of the truth of the charge, the State has proved its case beyond a reasonable doubt. If you are not firmly convinced of the truth of the charge, you must find the defendant Not Guilty.

Now what is evidence? Evidence is all of the testimony received from the witnesses and the exhibits. Evidence may be direct or circumstantial or a combination of both.

Direct evidence is testimony given by a witness that has seen or heard the facts to which he testifies. It includes exhibits and those things admitted in the case.

Evidence also may be used to present a fact by inference. This is referred to as "Circumstantial evidence." Circumstantial evidence is the proof of a fact by direct evidence from which you may infer other reasonable facts and conclusions.

In the absence of direct evidence, circumstantial evidence by itself will justify a finding of guilty in the circumstances, if the circumstances are entirely consistent with the defendant's guilt or wholly inconsistent with any reasonable theory of the defendant's innocence and are so convincing as to exclude a reasonable doubt of the defendant's guilt.

Where the evidence is both direct and circumstantial, the combination of the two must satisfy you of the defendant's guilt beyond a reasonable doubt.

The evidence, as I have said does not include the indictment, answers that you were instructed to disregard, opening and closing statements and arguments of counsel. There are designed to assist you, but they are not evidence.

You must not speculate as to why the Court sustained an objection to any question or what the answer to such question might have been. You must not draw any inference or

speculate on the truth of any suggestion included in the question that was not answered. Statements or answers that were strickened by the Court or which you were instructed to disregard are not evidence and must be treated by you as though you never heard them.

You, the jury, are the sole judges of the fact, the credibility of the witnesses, the weight of the testimony and the weight of the evidence. To weigh the evidence you must consider the credibility of each person testifying. You will apply the tests of truthfulness which you apply in your daily lives. These tests include appearance of each witness on the stand; the manner of testifying; the reasonableness of his testimony; the opportunity which he had to see and hear or know the things about which he testified; the accuracy of his memory; frankness or lack of intelligence; interest or bias; together with all the facts and circumstances surrounding his testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper.

You are not required to believe the testimony of any witness simply because the witness was under oath. You may believe or disbelieve all or any part of the testimony of the witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

There are two cases involved in this trial. In case No. 77-CR-131, the defendant is charged with Aggravated Trafficking in Marijuana. Before you can find the defendant guilty, you must find beyond a reasonable doubt that:

> On or about the 8th day of October, 1977, and in Wayne County Ohio, the defendant knowingly sold marijuana resin preparation and that the marijuana resin preparation was in a liquid concentrate, liquid extract or liquid distillate form, a controlled substance.

Now in Case No. 77-CR-157, the defendant is charged

with Trafficking in Drugs. Before you can find the defendant guilty, you must find beyond a reasonable doubt that:

> On or about the 21st day of October, 1977, and in Wayne County, Ohio, the defendant knowingly sold or offered to sell cocaine, a controlled substance, in an amount less than the minimum bulk amount.

Bulk amount as it applies to this case, 77-CR-157, is an amount equal to or exceeding ten grams.

There are certain definitions which the Court will give you which you will apply in your deliberations.

Knowingly, Knowingly. A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or he is aware that his conduct will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist. Knowingly means that a person is aware of the existence of facts that his acts will probably cause a certain result or be of a certain nature. Since you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence.

Sale. Sale includes delivery, barter, exchange, transfer or gift or offer thereof, and each transaction made by any person whether as principal, proprietor, agent, servant or employee.

Offer. Offer means to present for acceptance or rejection.

Marijuana means all parts of any plant of the genus cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oils or cake made from the seeds of the plant, any other compound, manu-

facture, salt, derivative, mixture or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterlized seed of the plant which is incapable of germination.

Bulk Amount. Section 2925.01 (E) (3) fixed the bulk amount as it applies to Case No. 77-CR-131 as an amount equal to or exceeding two grams of resin in a liquid concentrate, liquid extract, or liquid distillate form.

Controlled Substance. A controlled substance means a drug, compound, mixture, preparation or substance included in Schedule I, II, III, IV or V of Section 3719.41, Ohio Revised Code; and the Court charges you that marijuana resin preparation is included in Schedule I of Section 3719.41, Ohio Revised Code.

The Court further charges you that Cocaine is a controlled substance.

Generally a witness may not express an opinion. However, one who follows a profession or special line of work may express his opinion because of his education, knowledge and experience. Such testimony is admitted for whatever assistance it may provide to help you to arrive at a just verdict.

Questions have been asked in which an expert witness was permitted to assume that certain facts were true and to give an opinion based upon such assumption. You must determine whether the assumed facts, upon which the expert based his opinion, are true. If any assumed fact was not established, you will determine its effect upon the opinion of the expert. As with other witnesses, upon you alone rests the duty of deciding what weight should be given to the testimony of the expert. In determining its weight, you may take into consideration his skill, experience, knowledge, veracity, familiarity with the facts of this case, and the usual rules or

testing credibility and determining the weight to be given to the testimony.

The testimony of the defendant is to be weighed by the same rules that apply to other witnesses.

Now a number of exhibits and testimony relating to them have been introduced. You may consider whether the objects are the same objects and in the same condition as originally taken by the officer. You will determine what weight, if any, the exhibits should receive in light of all the evidence.

The defendant denies that he formed a purpose to commit a crime. He claims that he is excused because he was unlawfully entrapped by the undercover agent.

Unlawful entrapment occurs when a police officer or agent plants in the mind of the defendant the original idea and purpose, inducing the defendant to commit a crime that he had not considered, and which otherwise he had no intention of committing, or would not have committed but for the inducement of the undercover agent.

If the defendant did not himself conceive the idea of committing a crime, and it was suggested to him by the officer for the purpose of causing his arrest, the defendant must be found Not Guilty. However, if the defendant commits a crime while acting, even in part, in carrying out his own purpose or plan to violate the law, an entrapment is not unlawful and is not a defense, even if the officer suggested the crime and provided the opportunity or facilities or added or encouraged its commission.

A person is not entrapped when officers, for the purpose of detecting crime, merely present a defendant with the opportunity to commit an offense. Under such circumstances, craft and pretense may be used by law officers to accomplish such a purpose.

If you find by credible evidence that the defendant had the

predisposition and criminal design to commit the acts into which he claims he was entrapped, and that he was merely provided with an opportunity to commit those acts for which he was both apt and willing, then he has not been unlawfully entrapped. The claim of unlawful entrapment is a denial of general criminal purpose as a result of special facts or circumstances.

If, after considering all the evidence, including that on the subject of entrapment, you are not convinced beyond a reasonable doubt of the defendant's guilt, you must return a verdict of Not Guilty.

Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result or engaging in specific conduct. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates it by his conduct.

Now I have outlined the essential elements of the criminal charges in both cases. If you find that the State has proved beyond a reasonable doubt all of the essential elements of any one or more of the crimes charged in the separate counts in the indictments, your verdict must be Guilty as to such crime or crimes according to your findings.

If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of any one or more of the crimes charged in the separate cases, your verdict must be Not Guilty as to such crime or crimes, according to your findings.

Consider the cases separately. The charges set forth in each case in the indictments constitute a separate and distinct matter. You must consider each case and the evidence applicable to each case separately and you must

state your findings as to each case uninfluenced by your verdict as to any other case. The defendant may be found Guilty or Not Guilty of any one or all of the crimes charged.

You will have with you in your jury room the two forms of verdict, one for each case. In Case No. 77-CR-131, the verdict form in this case reads:

"We, the jury, find the defendant, Donald T. Emery," then there is a blank to fill in "Guilty" or "Not Guilty."

If your verdict is Guilty in Case No. 77-CR-131, you will separately find the amount of marijuana resin preparation sold. However, you need not find and return a verdict on the exact amount. It is sufficient if you find that the amount is less than the bulk amount, bulk amount, or equal to or exceeding three times the bulk amount.

If your verdict is Not Guilty in Case No. 77-CR-131, you need not find and determine the amount sold. The verdict form provides, in the event you find him Guilty,

"and we do find the amount of marijuana resin preparation sold to be," and you will fill in as I have said,

"less than bulk amount,

"bulk amount," or

"equal to or exceeding three times the bulk amount."

In Case No. 77-CR-157, the verdict form in this case reads:

"We, the jury, find the defendant, Donald T. Emery," then there is a blank to fill in "Guilty" or "Not Guilty" according to your findings. In Case No. 77-CR-157, you need not concern yourselves with the amount sold.

Now you have no right to consider or discuss the subject of punishment. Your duty is confined to determining the guilt or innocence of the defendant. The duty to determine the punishment is placed by law upon the Court.

You must not be influenced by any consideration of

sympathy or prejudice; but it is your duty to carefully weigh the evidence and decide the disputed questions of fact and apply the instructions of the Court and render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a fair and just verdict. Consider all the evidence and make your finding with intelligence and impartiality, without bias or sympathy or prejudice so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

If, during the course of the trial, the Court said or did anything which you consider an indication of the Court's view of the facts, you are instructed to disregard it for none was intended.

Your first duty upon entering the jury room is to select a foreman or forelady to preside over your deliberations. The foreman or forelady will see that your deliberations are orderly and that each juror has the opportunity to discuss the case and cast his vote; otherwise the authority of the foreman is the same as any other juror.

Your initial conduct upon entering the jury room is a matter of importance. It is not wise to immediately insist upon a verdict because if your sense of pride is aroused, you may hesitate to change your position, even if you decide you are wrong. Consult with one another and consider each other's views. Deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself, but you should do so only after discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if you are convinced it is wrong; however, you should not surrender an honest conviction in order to be congenial or to reach a verdict solely because of the opinion of other jurors.

The Court will place in your possession the verdict forms that I have explained to you, the exhibits and a copy of these instructions. The foreman or forelady will retain possession of these forms and return them to the Court. Until a verdict is pronounced in open Court, you are not to disclose to anyone else the status of your deliberations or the nature of your vote.

When all twelve of you have agreed upon a verdict, complete the forms that correspond to that decision and all twelve of you jurors sign the verdict or verdicts in ink. You will notify the Court by knocking on the door of the jury room; and if at any time the jury has a question it shall be reduced to writing by the foreman or forelady and signal for the Bailiff and give it to him. He will relay it to the Court. The foreman or forelady will sign the paper on which the question is written.

I instruct you further that any question you have should not be related verbally to the Baliff. He has no authority to hear it. As far as any question is concerned, do not direct it to the Bailiff, as he as no authority to hear or entertain them.